LRB-0482

2003 DRAFTING REQUEST

Bill

Received: **10/16/2002**

Received By: **mlief**

Wanted: **As time permits**

Identical to LRB:

For: **Scott Gunderson (608) 266-3363**

By/Representing: **mike**

This file may be shown to any legislator: **NO**

Drafter: **mlief**

May Contact:

Addl. Drafters:

Subject: **Real Estate - miscellaneous**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Gunderson@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Regulation of closing costs for real estate transactions

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?							
/1	mlief 10/16/2002	jdyer 10/17/2002	pgreensl 10/17/2002	_____ _____	lkunkel 10/17/2002		
/2	mlief 10/18/2002	jdyer 10/18/2002	rschluet 10/18/2002	_____ _____	mbarman 10/18/2002	lemery 10/21/2002	

FE Sent For:

None Needed

<END>

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12 10/18 jld 10-18-2

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FE Sent For:			P8	<END> P8 RB			

10/15 Tc to Mike
-Left message asking if request shall wanted

10/16 - yes - Wanted for introduction at beg of session

Draft language for regulation of closing costs:

Definitions

"Closing" means the process of executing legally binding documents evidencing the sale and conveyance of real estate, the establishment of a lien on real estate that is subject to a mortgage loan, or both.

"Closing service" means any service provided in connection with a prospective or actual closing.

Prohibition

No person may accept from a buyer or seller of real estate any of the following fees for the rendering of a closing service:

1. A fee for which no closing service is actually performed.
2. A fee for which a nominal closing service is performed.
3. A fee which duplicates any other fee, or portion of any other fee, paid by the buyer or the seller for a closing service.
4. A fee for a closing service performed by a third party in excess of the amount that the third party charges for the service.

Lief, Madelon

From: Marchant, Robert
Sent: Friday, June 14, 2002 12:38 PM
To: Lief, Madelon
Subject: FW: Closing costs

Lonnie--

Per Pam's email below, I am forwarding my message to Pam to you :)

I was not aware that we are taking on our new areas before the start of next session.

Let me know if you'd like to talk about this request at all.

Rob

-----Original Message-----
From: Kahler, Pam
Sent: Friday, June 14, 2002 11:48 AM
To: Marchant, Robert
Subject: RE: Closing costs

Hi, Rob:

If you're thinking that the subject of the draft is real estate, Lonnie is taking that subject area from me. I'm not working on any new drafts in my "old" areas - only wrapping up any "old" drafts that I started before. The topic sounds familiar, though. Didn't Mark K. end up doing something on licensing closing agents - or, at least, it evolved into that? Maybe the impetus for that draft was the same as for this one.

Pam

-----Original Message-----
From: Marchant, Robert
Sent: Friday, June 14, 2002 11:36 AM
To: Kahler, Pam
Subject: Closing costs

6-3363

Hi, Pam--

I have been speaking with Mike Bruhn in Rep. Gunderson's office about regulating closing costs. After doing the legal research and beginning to put together draft language, it appears to me that this draft is probably yours (I initially thought it only dealt with mortgage lenders). I have attached below the two relevant cases and a link to an article describing the problem the Rep. has identified, along with my crack at some draft language to address the problem. I have researched the federal RESPA requirements and I think the state has the authority to regulate closing costs in this way. I have photo copies of my research for the file.

Let me know if you'd like to get together and talk about this draft. I have not entered the request.

The article:
http://www.washingtonpost.com/wp-dyn/articles/A40500-2002May31.html

The cases:

<< File: 4th Circuit Closing Costs Case.doc >> << File: 7th Circuit Closing Cost Case.doc >>
The draft language:

<< File: Closing costs draft language.doc >>

6-3363

Robert J. Marchant
Legislative Attorney

Marchant, Robert

From: Marchant, Robert
Sent: Friday, June 14, 2002 11:41 AM
To: Bruhn, Mike
Subject: RE: Clark Howard Show Notes Monday, June 3

Will do. It will most likely be Pam Kahler who does the drafting, but it might be me. Feel free to contact me for an update.

Rob

-----Original Message-----
From: Bruhn, Mike
Sent: Friday, June 14, 2002 11:40 AM
To: Marchant, Robert
Subject: RE: Clark Howard Show Notes Monday, June 3

Rob,

Thank you for your work on this. If you wouldn't mind entering the request, I'd appreciate it!

Mike Bruhn
Rep. Gunderson's office

-----Original Message-----
From: Marchant, Robert
Sent: Friday, June 14, 2002 11:39 AM
To: Bruhn, Mike
Subject: RE: Clark Howard Show Notes Monday, June 3

Mike--

I had some time today to do this research and it looks to me as though the state probably can prohibit anyone from charging for closing services that aren't actually performed and from marking up the price of services performed by third parties. Would you like me to enter this request for the Rep.?

Rob

-----Original Message-----
From: Bruhn, Mike
Sent: Thursday, June 13, 2002 3:30 PM
To: Marchant, Robert
Subject: RE: Clark Howard Show Notes Monday, June 3

Thanks Rob...I appreciate the update.

Mike

-----Original Message-----
From: Marchant, Robert
Sent: Thursday, June 13, 2002 3:28 PM
To: Bruhn, Mike
Subject: RE: Clark Howard Show Notes Monday, June 3

Mike--

That is a good question. I'll need to do some legal research in order to answer it. I just wanted to let you know that if it takes a little

while before you hear back from me, it is not because I am blowing you off. I need to find out the extent to which the federal law preempts the states from regulating these fees.

I'll get back to you . . .

Rob

-----Original Message-----
From: Bruhn, Mike
Sent: Thursday, June 13, 2002 3:11 PM
To: Marchant, Robert
Subject: RE: Clark Howard Show Notes Monday, June 3

Rob,

Thanks again for getting me this information. I've read through all of it, and I understand that the federal government is looking at legislation to address this...My question is, if the federal government should fail to act, is this something that state's (namely Wisconsin) could address through their own legislation?

Thanks,

Mike

-----Original Message-----
From: Marchant, Robert
Sent: Tuesday, June 11, 2002 1:16 PM
To: Bruhn, Mike
Subject: RE: Clark Howard Show Notes Monday, June 3

<< File: 4th Circuit Closing Costs Case.doc >> << File: 7th Circuit Closing Cost Case.doc >> MIke--

The two opinions are attached below. The one from the 7th Circuit is the opinion governing Wisconsin.

Rob

-----Original Message-----
From: Bruhn, Mike
Sent: Tuesday, June 11, 2002 9:43 AM
To: Marchant, Robert
Subject: Clark Howard Show Notes Monday, June 3

http://clarkhoward.com/shownotes/2002/06/03.html

Marchant, Robert

From: Marchant, Robert
Sent: Friday, June 14, 2002 11:36 AM
To: Kahler, Pam
Subject: Closing costs

Hi, Pam--

I have been speaking with Mike Bruhn in Rep. Gunderson's office about regulating closing costs. After doing the legal research and beginning to put together draft language, it appears to me that this draft is probably yours (I initially thought it only dealt with mortgage lenders). I have attached below the two relevant cases and a link to an article describing the problem the Rep. has identified, along with my crack at some draft language to address the problem. I have researched the federal RESPA requirements and I think the state has the authority to regulate closing costs in this way. I have photo copies of my research for the file.

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The cases:


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7th Circuit Closing Cost Case....

The draft language:


Closing costs draft language.d...

Robert J. Marchant
Legislative Attorney
State of Wisconsin Legislative Reference Bureau
608-261-4454

The Nation's Housing
Kenneth R. Harney

Court Allows Padding of Settlement Fees

By Kenneth R. Harney
Saturday, June 1, 2002; Page H01

After a recent federal appeals court decision, mortgage borrowers in five states, including Maryland and Virginia, can now have their settlement charges marked up -- padded without limit -- by lenders, title companies and others looking to squeeze more money out of real estate transactions.

Home buyers and refinancers in Maryland, Virginia, North Carolina, South Carolina and West Virginia last week lost their federal protection against undisclosed settlement-cost surcharges on appraisal, credit recpor, courier, recordation and other fees. (The appeals court's jurisdiction does not include the District.)

That means that a lender or settlement agent in those states could, for example, now charge:

- $350 for an appraisal that was performed electronically at a cost of a few dollars.
- $65 for a credit file that cost $9.
- $75 for document delivery charges that actually were a small fraction of that amount.
- Hundreds of dollars for other, under-the-table add-ons that were illegal just two weeks ago.

Mortgage loan consume prot Act

In a stunning rebuke to federal housing officials and the Justice Department, the 4t Circuit Court of Appeals ruled that a mortgage company that marked up credit rep to a consumer violated no federal law.

Absent congressional action or a successful appeal to the Supreme Court, the cour now law in the states covered by the 4th Circuit. A similar decision prevails in Illi Wisconsin and Indiana, where an appellate court sanctioned unlimited settlement-

last summer. Similar cases are underway elsewhere around the country, opening u possibility of rapid reversals of home buyers' traditional legal protections as federa courts cite the two appellate court decisions as precedents.

"This is a disaster for consumers," said one lawyer familiar with the case. "It's goi season for rip-offs."

The 4th Circuit decision in *Boulware v. Crossland Mortgage Corp.* involved a cha Maryland homeowner to a $65 fee for a credit report at settlement. Tyna L. Boulw the fee, alleging that Crossland Mortgage paid its credit information vendor $15 o $50 markup was a violation of a long-standing federal prohibition, Boulware said.

Crossland Mortgage never denied the markup in court. But its lawyers argued that does not specifically ban surcharges unless they are split with a third party.

In a ruling written by Chief Judge J. Harvie Wilkinson III, the appellate court agre defense, rejecting what it said was Boulware's contention that federal real estate se is "a broad price-control statute prohibiting any overcharges for real estate settlem

The lawyer representing Boulware, James E. Felman of Tampa, said he may reque rehearing of the case and possibly an appeal to the Supreme Court. For years, the I of Housing and Urban Development has prohibited "up-charges" or markups of se related fees that are not accompanied by additional services that justify the add-on

By coincidence, the Boulware decision was made the same week that a bill was in Congress to clarify and bolster federal prohibitions against markups. That bill, the Loan Consumer Protection Act, was authored by Rep. John J. LaFalce (D-N.Y.), r minority member of the House Financial Services Committee.

The proposal would ban "markups of the cost of services performed or goods prov another service provider, and fees charged or collected by one settlement service p where no, nominal or duplicative work is done." It also would require that all fees a lender be disclosed clearly on the settlement sheet as being collected by the lend to LaFalce, "this provides additional protections against the practice of disguising rolling them into one single disclosure item."

Lenders and the title industry are generally enthusiastic about the Boulware decisi worried about LaFalce's bill. Washington lawyer Sheldon Hochberg, who represer insurance companies, said the bill could open lenders and others to new legal attac fairness of their fees.

"No one can be on the side of abusive markups," said Hochberg, but some fees, su charges and certain title expenses, "are not known precisely on the date of settlem settlement agents to make estimates that may prove high or low.

The upshot of all this for consumers? Whether you live in the eight states where m now legally sanctioned or not, be aware that the federal protections that you once had may now be evaporating in federal court.

Kenneth R. Harney's e-mail address is kenharney@aol.com.

Reg X (RESPA)

shall have the right to inspect or require copies of records covered by this paragraph (c).

(Approved by the Office of Management and Budget under control number 2502-0265)

§ 3500.11 Mailing.

The provisions of this part requiring or permitting mailing of documents shall be deemed to be satisfied by placing the document in the mail (whether or not received by the addressee) addressed to the addresses stated in the loan application or in other information submitted to or obtained by the lender at the time of loan application or submitted or obtained by the lender or settlement agent, except that a revised address shall be used where the lender or settlement agent has been expressly informed in writing of a change in address.

§ 3500.12 No fee.

No fee shall be imposed or charge made upon any other person, as a part of settlement costs or otherwise, by a lender in connection with a federally related mortgage loan made by it (or a loan for the purchase of a manufactured home), or by a servicer (as that term is defined under 12 U.S.C. 2605(i)(2)) for or on account of the preparation and distribution of the HUD-1 or HUD-1A settlement statement; escrow account statements required pursuant to section 10 of RESPA (12 U.S.C. 2609), or statements required by the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*

§ 3500.13 Relation to State laws.

(a) State laws that are inconsistent with RESPA or this part are preempted to the extent of the inconsistency. However, RESPA and these regulations do not annul, alter, affect, or exempt any person subject to their provisions from complying with the laws of any State with respect to settlement practices, except to the extent of the inconsistency.

(b) Upon request by any person, the Secretary is authorized to determine if inconsistencies with State law exist; in doing so, the Secretary shall consult with appropriate Federal agencies.

(1) The Secretary may not determine that a State law or regulation is inconsistent with any provision of RESPA or this part, if the Secretary determines that such law or regulation gives greater protection to the consumer.

(2) In determining whether provisions of State law or regulations concerning affiliated business arrangements are inconsistent with RESPA or this part, the Secretary may not construe those provisions that impose more stringent limitations on affiliated business arrangements as inconsistent with RESPA so long as they give more protection to consumers and/or competition.

(c) Any person may request the Secretary to determine whether an inconsistency exists by submitting to the address indicated in § 3500.3, a copy of the State law in question, any other law or judicial or administrative opinion that implements, interprets or applies the relevant provision, and an explanation of the possible inconsistency. A determination by the Secretary that an inconsistency with State law exists will be made by publication of a notice in the FEDERAL REGISTER. "Law" as used in this section includes regulations and any enactment which has the force and effect of law and is issued by a State or any political subdivision of a State.

(d) A specific preemption of conflicting State laws regarding notices and disclosures of mortgage servicing transfers is set forth in § 3500.21(h).

[61 FR 13233, Mar. 26, 1996, as amended at 61 FR 58476, Nov. 15, 1996]

§ 3500.14 Prohibition against kickbacks and unearned fees.

(a) *Section 8 violation.* Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607) and is subject to enforcement as such under § 3500.19.

(b) *No referral fees.* No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 3500.14(g)(1). A

Reg X (RESPA)

which includes the following information:

(a) The number of single-wide and double-wide manufactured homes labeled in the preceding month;

(b) The number of inspection visits made to each manufacturing plant in the preceding month; and

(c) The number of manufactured homes with a failure to conform to the standards or an imminent safety hazard during the preceding month found in the manufacturing plant.

The manufacturers report for the preceding month described in § 3282.552 shall be attached to each such IPIA report as an appendix thereto.

§ 3282.554 SAA reports.

Each SAA shall submit, prior to the last day of each month, to the Secretary a report covering the preceding month which includes:

(a) The description and status of all presentations of views, hearings and other legal actions during the preceding month; and

(b) The description of the SAA's oversight activities and findings regarding consumer complaints, notification and correction actions during the preceding month. The IPIA report for the preceding month described in § 3282.553, as well as the reports described in § 3282.413 and manufacturer reports under § 3282.404(d), which were received during the preceding month, shall be attached to each such SAA report as an appendix thereto.

PART 3500—REAL ESTATE SETTLEMENT PROCEDURES ACT

Sec.

AUTHORITY: 12 U.S.C. 2601 *et seq.*; 42 U.S.C. 3535(d).

SOURCE: 57 FR 49607, Nov. 2, 1992, unless otherwise noted. Sections 3500.1 through 3500.19 and 3500.21 revised at 61 FR 13233, Mar. 26, 1996.

§ 3500.1 Designation.

This part may be referred to as Regulation X.

§ 3500.2 Definitions.

(a) *Statutory terms.* All terms defined in RESPA (12 U.S.C. 2602) are used in accordance with their statutory meaning unless otherwise defined in paragraph (b) of this section or elsewhere in this part.

(b) *Other terms.* As used in this part:

Application means the submission of a borrower's financial information in anticipation of a credit decision, whether written or computer-generated, relating to a federally related mortgage loan. If the submission does not state or identify a specific property, the submission is an application for a prequalification and not an application for a federally related mortgage loan under this part. The subsequent addition of an identified property to the submission converts the submission to

an application for a federally related mortgage loan.

Business day means a day on which the offices of the business entity are open to the public for carrying on substantially all of the entity's business functions.

Dealer means, in the case of property improvement loans, a seller, contractor, or supplier of goods or services. In the case of manufactured home loans, "dealer" means one who engages in the business of manufactured home retail sales.

Dealer loan or dealer consumer credit contract means, generally, any arrangement in which a dealer assists the borrower in obtaining a federally related mortgage loan from the funding lender and then assigns the dealer's legal interests to the funding lender and receives the net proceeds of the loan. The funding lender is the lender for the purposes of the disclosure requirements of this part. If a dealer is a "creditor" as defined under the definition of "federally related mortgage loan" in this part, the dealer is the lender for purposes of this part.

Effective date of transfer is defined in section 6(i)(1) of RESPA (12 U.S.C. 2605(i)(1)). In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, the effective date of transfer is the transfer date agreed upon by the transferee servicer and the transferor servicer.

Federally related mortgage loan or *mortgage loan* means as follows:

(1) Any loan (other than temporary financing, such as a construction loan):

(i) That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property upon which there is either:

(A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or

(B) Located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and

(ii) For which one of the following paragraphs applies. The loan:

(A) Is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government;

(B) Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way:

(*1*) By the Secretary or any other officer or agency of the Federal Government; or

(*2*) Under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other officer or agency of the Federal Government;

(C) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors);

(D) Is made in whole or in part by a "creditor", as defined in section 103(f) of the Consumer Credit Protection Act (15 U.S.C. 1602(f)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. For purposes of this definition, the term "creditor" does not include any agency or instrumentality of any State, and the term "residential real estate loan" means any loan secured by residential real property, including single-family and multifamily residential property;

(E) Is originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition, by a mortgage broker; or

(F) Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage," issued by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(2) Any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property is a federally related mortgage

loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(3) If the residential real property securing a mortgage loan is not located in a State, the loan is not a federally related mortgage loan.

Good faith estimate means an estimate, prepared in accordance with section 5 of RESPA (12 U.S.C. 2604), of charges that a borrower is likely to incur in connection with a settlement.

HUD–1 or HUD–1A settlement statement (also *HUD–1 or HUD–1A*) means the statement that is prescribed by the Secretary in this part for setting forth settlement charges in connection with either the purchase or the refinancing (or other subordinate lien transaction) of 1- to 4-family residential property.

Lender means, generally, the secured creditor or creditors named in the debt obligation and document creating the lien. For loans originated by a mortgage broker that closes a federally related mortgage loan in its own name in a table funding transaction, the lender is the person to whom the obligation is initially assigned at or after settlement. A lender, in connection with dealer loans, is the lender to whom the loan is assigned, unless the dealer meets the definition of creditor as defined under "federally related mortgage loan" in this section. See also § 3500.5(b)(7), secondary market transactions.

Managerial employee means an employee of a settlement service provider who does not routinely deal directly with consumers, and who either hires, directs, assigns, promotes, or rewards other employees or independent contractors, or is in a position to formulate, determine, or influence the policies of the employer. Neither the term "managerial employee" nor the term "employee" includes independent contractors, but a managerial employee may hold a real estate brokerage or agency license.

Manufactured home is defined in § 3280.2 of this title.

Mortgage broker means a person (not an employee or exclusive agent of a lender) who brings a borrower and lender together to obtain a federally related mortgage loan, and who renders services as described in the definition of "settlement services" in this section. A loan correspondent approved under § 202.8 of this title for Federal Housing Administration programs is a mortgage broker for purposes of this part.

Mortgaged property means the real property that is security for the federally related mortgage loan.

Person is defined in section 3(5) of RESPA (12 U.S.C. 2602(5)).

Public Guidance Documents means documents that HUD has published in the FEDERAL REGISTER, and that it may amend from time-to-time by publication in the FEDERAL REGISTER. These documents are also available from HUD at the address indicated in 24 CFR 3500.3.

Refinancing means a transaction in which an existing obligation that was subject to a secured lien on residential real property is satisfied and replaced by a new obligation undertaken by the same borrower and with the same or a new lender. The following shall not be treated as a refinancing, even when the existing obligation is satisfied and replaced by a new obligation with the same lender (this definition of "refinancing" as to transactions with the same lender is similar to Regulation Z, 12 CFR 226.20(a)):

(1) A renewal of a single payment obligation with no change in the original terms;

(2) A reduction in the annual percentage rate as computed under the Truth in Lending Act with a corresponding change in the payment schedule;

(3) An agreement involving a court proceeding;

(4) A workout agreement, in which a change in the payment schedule or change in collateral requirements is agreed to as a result of the consumer's default or delinquency, unless the rate is increased or the new amount financed exceeds the unpaid balance plus earned finance charges and premiums for continuation of allowable insurance; and

(5) The renewal of optional insurance purchased by the consumer that is added to an existing transaction, if disclosures relating to the initial purchase were provided.

Regulation Z means the regulations issued by the Board of Governors of the Federal Reserve System (12 CFR part 226) to implement the Federal Truth in Lending Act (15 U.S.C. 1601 *et seq.*), and includes the Commentary on Regulation Z.

Required use means a situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service. However, the offering of a package (or combination of settlement services) or the offering of discounts or rebates to consumers for the purchase of multiple settlement services does not constitute a required use. Any package or discount must be optional to the purchaser. The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process.

RESPA means the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.*

Servicer means the person responsible for the servicing of a mortgage loan (including the person who makes or holds a mortgage loan if such person also services the mortgage loan). The term does not include:

(1) The Federal Deposit Insurance Corporation (FDIC) or the Resolution Trust Corporation (RTC), in connection with assets acquired, assigned, sold, or transferred pursuant to section 13(c) of the Federal Deposit Insurance Act or as receiver or conservator of an insured depository institution; and

(2) The Federal National Mortgage Corporation (FNMA); the Federal Home Loan Mortgage Corporation (Freddie Mac); the RTC; the FDIC; HUD, including the Government National Mortgage Association (GNMA) and the Federal Housing Administration (FHA) (including cases in which a mortgage insured under the National Housing Act (12 U.S.C. 1701 *et seq.*) is assigned to HUD); the National Credit Union Administration (NCUA); the Farmers Home Administration or its successor agency under Public Law 103–354 (FmHA); and the Department of Veterans Affairs (VA), in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by termination of the contract for servicing the loan for cause, commencement of proceedings for bankruptcy of the servicer, or commencement of proceedings by the FDIC or RTC for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

Servicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower.

Settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called "closing" or "escrow" in different jurisdictions.

Settlement service means any service provided in connection with a prospective or actual settlement, including, but not limited to, any one or more of the following:

(1) Origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of such loans);

(2) Rendering of services by a mortgage broker (including counseling, taking of applications, obtaining verifications and appraisals, and other loan processing and origination services, and communicating with the borrower and lender);

(3) Provision of any services related to the origination, processing or funding of a federally related mortgage loan;

(4) Provision of title services, including title searches, title examinations, abstract preparation, insurability determinations, and the issuance of title commitments and title insurance policies;

(5) Rendering of services by an attorney;

(6) Preparation of documents, including notarization, delivery, and recordation;

(7) Rendering of credit reports and appraisals;

(8) Rendering of inspections, including inspections required by applicable law or any inspections required by the sales contract or mortgage documents prior to transfer of title;

(9) Conducting of settlement by a settlement agent and any related services;

(10) Provision of services involving mortgage insurance;

(11) Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;

(12) Provision of services involving mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;

(13) Provision of services involving real property taxes or any other assessments or charges on the real property;

(14) Rendering of services by a real estate agent or real estate broker; and

(15) Provision of any other services for which a settlement service provider requires a borrower or seller to pay.

Special information booklet means the booklet prepared by the Secretary pursuant to section 5 of RESPA (12 U.S.C. 2604) to help persons understand the nature and costs of settlement services. The Secretary publishes the form of the special information booklet in the FEDERAL REGISTER. The Secretary may issue or approve additional booklets or alternative booklets by publication of a Notice in the FEDERAL REGISTER.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see § 3500.5(b)(7)).

Title company means any institution, or its duly authorized agent, that is qualified to issue title insurance.

[61 FR 13233, Mar. 26, 1996, as amended at 61 FR 29252, June 7, 1996; 61 FR 58475, Nov. 15, 1996; 62 FR 20088, Apr. 24, 1997]

EFFECTIVE DATE NOTE: At 61 FR 29252, June 7, 1996, § 3500.2(b) was amended by adding a definition of "managerial employee", effective Oct. 7, 1996. At 61 FR 51782, Oct. 4, 1996, the effective date was delayed until further notice.

§ 3500.3 Questions or suggestions from public and copies of public guidance documents.

Any questions or suggestions from the public regarding RESPA, or requests for copies of HUD Public Guidance Documents, should be directed to the Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–8000, rather than to HUD field offices. Legal questions may be directed to the Assistant General Counsel, GSE/RESPA Division, at this address.

§ 3500.4 Reliance upon rule, regulation or interpretation by HUD.

(a) *Rule, regulation or interpretation.* (1) For purposes of sections 19 (a) and (b) of RESPA (12 U.S.C. 2617 (a) and (b)) only the following constitute a rule, regulation or interpretation of the Secretary:

(i) All provisions, including appendices, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the FEDERAL REGISTER by the Secretary and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Such documents will be prepared by HUD staff and counsel. Such documents may be revoked or amended by a subsequent document published in the FEDERAL REGISTER by the Secretary.

LEXSEE 256 F.3d 623

Francisco J. Echevarria, Barbara Echevarria and Bobbie L. Hall, Plaintiffs-Appellants, v. Chicago Title & Trust Company, Defendant-Appellee.

No. 00-4087

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

256 F.3d 623; 2001 U.S. App. LEXIS 15050

May 8, 2001, Argued

July 5, 2001, Decided

PRIOR HISTORY:
[**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 00 C 3949. James B. Zagel, Judge.

DISPOSITION:
AFFIRMED.

COUNSEL:
For FRANCISCO J. ECHEVARRIA, BARBARA ECHEVARRIA, BOBBIE L. HALL, Plaintiffs - Appellants: Keith J. Keogh, EDELMAN, COMBS & LATTURNER, Chicago, IL USA.

For CHICAGO TITLE & TRUST COMPANY, Defendant - Appellee: Albert E. Fowerbaugh, Jr., LORD BISSELL & BROOK, Chicago, IL USA.

JUDGES:
Before Bauer, Posner, and Coffey, Circuit Judges.

OPINIONBY:
Bauer

OPINION:

[*624]

Bauer, *Circuit Judge.* Plaintiffs, home buyers who hired Chicago Title & Trust Company to record their home deeds and mortgages, sued Chicago Title claiming that it violated § 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), *12 U.S.C. § 2607*(b), by unlawfully splitting fees with the Cook County Recorder. Chicago Title charged Francisco and Barbara Echevarria $ 25.00 to record their deed and $ 45.00 to record their mortgage. This charge did not match the Cook County Recorder's fees. The County Recorder required $ 25.00 to record the Echevarrias' deed, but only $ 31.00 to record their mortgage. Chicago **[*625]** Title pocketed the $ 14.00 overcharge. Similarly, Chicago Title charged Bobbie Hall $ 25.00 to record her deed and $ 45.00 to record her mortgage. While the Cook County Recorder charged $ 25.00 to record Hall's deed, it only required $ 37.00 to record her mortgage. Again, Chicago Title kept the extra $ 8.00.

The Echevarrias and **[**2]** Hall filed a three-count complaint in federal court. They styled their only federal claim under RESPA § 8(b), accusing Chicago Title of splitting this amount with the Cook County Recorder by paying the recorder its fee and pocketing the overage. Further, plaintiffs brought two state law fraud claims, which we do not address. Plaintiffs then filed a motion to have the case certified as a class action.

Less than a month later, Chicago Title asked the court to dismiss the suit under Fed. R. Civ. P. 12(b)(6) and 12(b)(1). Chicago Title argued that plaintiffs failed to state facts tending to prove that Chicago Title gave an unearned fee to a third party or received an unearned fee from a third party, an essential element of the RESPA claim. As support, Chicago Title relied on *Durr v. Intercounty Title Co., 14 F.3d 1183 (7th Cir. 1993) cert. denied 513 U.S. 811, 130 L. Ed. 2d 20, 115 S. Ct. 63 (1994),* in which we held on very similar facts that the challenged behavior did not constitute fee splitting under RESPA § 8(b). Believing himself to be bound by this precedent, the district judge dismissed the RESPA claim. In addition, he dismissed both state law claims **[**3]** because the parties were not diverse and, absent the

RESPA claim, the court lacked subject-matter jurisdiction. We affirm the district court's dismissal.

We review *de novo* a dismissal for failure to state a claim. *See Transit Express, Inc. v. Ettinger, 246 F.3d 1018, 1023 (7th Cir. 2001)* (citation omitted). Dismissal for failure to state a claim is proper only where the court is convinced, beyond a reasonable doubt, that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Szumny v. American Gen. Fin., Inc., 246 F.3d 1065, 1067 (7th Cir. 2001)* (citation omitted). We accept well-pled factual allegations as true and draw all reasonable inferences in the plaintiffs' favor. *See Transit Express, 246 F.3d at 1023* (citation omitted).

Plaintiffs appeal the dismissal of their claims, taking two approaches. First, they attempt to distinguish their case from *Durr* and argue that they stated facts showing illegal fee splitting. Second, they contend that even if they failed to state facts showing a splitting of fees, their claim should not have been dismissed because fee splitting is no longer an element of **[**4]** RESPA § 8(b). Plaintiffs reason that since the events in *Durr,* HUD eliminated this element by (1) amending Regulation X, *24 C.F.R. § 3500.14*, and (2) issuing two opinion letters and one special information booklet to that effect.

A. Durr v. Intercounty Title

RESPA § 8(b) states:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). Plaintiffs and Chicago Title read the statute quite differently. Chicago Title urges that to avoid dismissal, plaintiffs must state facts showing that Chicago Title either received unearned fees from or paid unearned fees to a third party, here, the County Recorder. This is **[*626]** the position we took in *Durr, 14 F.3d at 1186-87.* Chicago Title argues that because it received the extra money from plaintiffs and kept these overcharges itself, rather than sharing them with a third party, there was no split. Plaintiffs, however, focus **[**5]** on the whole $ 45.00 Chicago Title charged as the purported mortgage filing fees. According to plaintiffs, the $ 45.00 was illegally split when Chicago Title paid a third party, the County Recorder, a portion of the fees ($ 31.00 and $ 37.00), and retained the overcharges ($ 14.00 and $ 8.00) for itself. Plaintiffs attempt to distinguish their situation from that in *Durr.*

The facts in *Durr* are virtually identical to the facts in this appeal. In *Durr,* Intercounty Title Company charged the plaintiff $ 25.00 to record the deed and $ 37.00 to record the mortgage of his new home, amounts which, after subtracting the County Recorder's fees and Intercounty's document-handling charge, resulted in an overcharge of roughly $ 8.00. *See 14 F.3d at 1184.* Intercounty pocketed this overage. *See id. at 1184-85.* Because Intercounty did not give unearned fees to or accept unearned fees from a third party, we held that Intercounty merely received a "windfall" and did not violate RESPA § 8(b) when it pocketed the overcharge. *See id.* We did not count the County Recorder as a third party for purposes of RESPA § 8(b) because it had no involvement whatsoever with the unearned **[**6]** fees. We reached the same result in *Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 270-71 (7th Cir. 1985)* (affirming the dismissal under Fed. R. Civ. P. 12(b)(6) of a RESPA § 8(b) claim because "the complaint did not allege that the defendant gave or received 'any portion, split, or percentage of any charge' to a third party.").

We are unable to distinguish the case at hand from *Durr.* As in that case, plaintiffs have failed to plead facts tending to show that Chicago Title illegally shared fees with the County Recorder. The Cook County Recorder received no more than its regular recording fees and it did not give to or arrange for Chicago Title to receive an unearned portion of these fees. The County Recorder has not engaged in the third party involvement necessary to state a claim under RESPA § 8(b).

Plaintiffs also cite to *United States v. Gannon, 684 F.2d 433, 438-39 (7th Cir. 1981)* (en banc) *cert. denied 454 U.S. 940, 70 L. Ed. 2d 248, 102 S. Ct. 475 (1981),* in which we held that under certain circumstances, one party could act as both the giver and acceptor of an illegal split for RESPA purposes. In *Gannon,* an employee in the **[**7]** County Recorder's office, acting in his capacity as the County's agent, charged banks a gratuity for "prompt service" in addition to the regular filing fee and pocketed the tip. *See 684 F.2d at 436.* We found that these gratuities were an unearned regular portion of recording fees charged by the employee in his official capacity and accepted by him in his individual capacity. *See id. at 438.* The case at issue, however, is easily distinguished from *Gannon.* Here, Chicago Title collected the fees from plaintiffs in its capacity as a title company and retained the overcharges in that same capacity. We cannot employ a legal fiction to treat Chicago Title as both the giver and third party receiver of unearned fees because it acted in the same legal capacity when it overcharged plaintiffs and when it retained the monies in excess of the recording fees.

Plaintiffs further direct our attention to a RESPA § 8(b) case that a district court refused to dismiss because

the plaintiffs successfully marshaled evidence showing a "split." *See Christakos v. Intercounty Title* **[*627]** *Co., 196 F.R.D. 496 (N.D. Ill. 2000). Christakos* is also distinguishable. In *Christakos,* Intercounty **[**8]** Title was responsible for handling the paperwork associated with refinancing a home loan. *See id. at 499-500.* The bank holding the initial mortgage agreed to file the paperwork to release the mortgage, but Intercounty Title charged the plaintiff to have the mortgage released twice, once by the bank and once by Intercounty. *See id. at 500.* The court found that plaintiffs alleged a split because Intercounty shared the fee with a third party, the bank. *See id. at 503.* The district court made a point of stating:

The weight of Seventh Circuit case law requires payment to a third party to trigger 2607(b).... To the extent plaintiff argues to the contrary, that any unearned fee violated RESPA, she is wrong and her argument is rejected.

Id. at 503 & n.4. There is no third party in the case before us. Because plaintiffs fail to accuse a third party of accepting unearned fees, *Durr* compels the dismissal of their RESPA claims.

This result makes sense considering not only RESPA's plain language, but its intended purpose. We stated in *Durr*:

At its core, 'RESPA is an anti-kickback statute.' *Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 270-71 (7th Cir. 1985).* **[**9]** Its purpose is to 'prohibit all kickback and referral fee arrangements whereby any payment is made or 'thing of value' [is] furnished for the referral of real estate settlement business.' *Id.* (quoting Senate Report).

14 F.3d at 1186. If we subjected to RESPA liability a title company that kept an overcharge without requiring allegations that it shared an unearned fee with a third party, we would radically, and wrongly, expand the class of cases to which RESPA § 8(b) applies.

B. Regulation X

Perhaps anticipating the above result, plaintiffs argue that a HUD amendment to regulation *24 C.F.R. 3500.14(c)* (also called "Regulation X"), which became effective after the events in *Durr,* eliminates the need to plead facts suggesting that defendants split an unearned fee with a third party. *12 U.S.C. § 2617*(a) bestows upon HUD broad power to "prescribe such rules and regulations, and to make such interpretations ... as may be necessary to achieve the purposes of this chapter." We must give effect to a regulation promulgated under such a broad grant of power provided it is "reasonably related to the purpose of the enabling **[**10]** regulation." *Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1972).* Regulation X now reads:

(c) *No split of charges except for actual services performed.* No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 C.F.R. § 3500.14(c) (2000). n1 Plaintiffs argue that the second sentence, added in **[*628]** 1992, expanded RESPA liability to all unearned fees such that stating a fee split with a third party is no longer a necessary element of a RESPA § 8(b) claim. We are mindful of the holding in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* **[**11]** *Inc.*, which requires us to defer to an agency's regulations, unless they are contrary to clear congressional intent, when Congress has not addressed the relevant issue or has done so ambiguously. *See 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1983).* Rather than addressing *Chevron* deference, however, we dispose of this issue on an alternate ground that was the focus of the parties' briefs: the meaning of the Regulation X amendment and whether it would remove the fee-splitting requirement should it be entitled to deference.

n1 Before it was amended, Regulation X read: No person shall give and no person shall accept any portion, split, or percentage of any change made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. 24 C.F.R. 3500. 14(b) (1992).

Plaintiffs argue that the second sentence's plain language clearly removes the need to charge "some type of 'split' or 'sharing' of fees . . **[**12]** . ." Chicago Title counters by relying on the only case to address the effect

of the Regulation X amendments on the requirement that a third party be involved in an illegal fee split. *See Willis v. Quality Mortgage U.S.A., Inc., 5 F. Supp. 2d 1306, 1308-09 (M.D. Ala. 1998).* We find the *Willis* reasoning persuasive and we adopt it. Evaluating the same argument plaintiffs make to us, the Willis court held that the amendments to Regulation X did not scrap the third party fee-splitting element of a RESPA § 8(b) claim. The *Willis* court evaluated the amendments to Regulation 3500.14(c) in context, reading the subsection as a whole. *See id. at 1309* ("The court may not, by concentrating on one sentence and ignoring its context, create an entirely new zone of proscribed conduct."). In light of this reading, it concluded: "Subpart (c) of Regulation 3500.14 prohibits ... payments for which no services are performed only if those payments are split with another party." *Id.* We note further that the new heading added by the 1992 amendments, *"No split of charges except for actual services performed,"* expresses clearly that HUD did not attempt to expand liability past situations **[**13]** involving fee splitting between the fee collector and a third party. The *Willis* court noted that HUD's stated purpose for amending Regulation 3500.14 was "to clarify what constitutes payments and services." *Id.* (quoting *57 Fed. Reg. 49,605* (Nov. 2, 1992)). Neither HUD's purpose nor the new language explicitly refers to expanding liability under RESPA § 8(b), and given the repeated reference to fee splitting and the purpose of the amendment, we hold that the amendments to Regulation X did not eliminate the requirement of third party fee splitting.

C. Opinion Letters and Special Information Booklet

Again relying on the HUD Secretary's authority to promulgate rules, regulations, and interpretations necessary to achieve the purposes of RESPA, *12 U.S.C. § 2617,* plaintiffs argue that the statements of HUD policy contained in two opinion letters and one special information booklet express HUD's intent to remove fee splitting as a required element of RESPA § 8(b). The district court refused to consider these statements because they are *ultra vires.* HUD's regulations themselves state clearly in a section entitled **"Reliance upon rule, regulation or interpretation [**14] by HUD"** that HUD opinion letters and information booklets do not constitute rules, regulations, or interpretations **[*629]** of the Secretary for purposes of RESPA. *See 24 C.F.R. 3500.4(a)(ii)(2).* The regulation proceeds to warn that reliance on unofficial statements such as these will not constitute a defense to a RESPA violation. *See 24 C.F.R. 3500.04(b).* We are extraordinarily reluctant to follow unofficial interpretations which the agency itself does not view as binding.

Recent Supreme Court precedent validates our reluctance. In *Christensen v. Harris County,* the Supreme Court distinguished between the deference due regulations promulgated by formal notice-and-comment rulemaking or formal adjudications and those made informally. *See 529 U.S. 576, 120 S. Ct. 1655, 1662, 146 L. Ed. 2d 621 (1999).* It stated:

> Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant *Chevron*-style deference. ... Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in **[**15]** *Skidmore v. Swift & Co., 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161* ... (1944), but only to the extent that those interpretations have the "power to persuade."

Id. The Court goes on to note an exception to this rule; when the language of a regulation is ambiguous, we defer to otherwise non-binding interpretations to allow the agency to interpret its own regulations. *See id.* (citing *Auer v. Robbins, 519 U.S. 452, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997)).* Although plaintiffs cite a number of other cases holding that we must defer to agency policy statements unless they are "demonstrably irrational," those cases either deal with rules made through formal procedures *see Lifanda v. Elmhurst Dodge, Inc., 237 F.3d 803, 809 (7th Cir. 2001)* (discussing a final rule which amended a regulation); special cases, *see, e.g., Stinson v. United States, 508 U.S. 36, 44-45, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993)* (holding that amendments to the Sentencing Guidelines Commentary should be treated as legislative rule-making due to a unique grant of power from Congress), or precedent superceded by *Christensen.* Plaintiffs argue that RESPA **[**16]** creates ambiguity by not expressly defining who a third party is in illegal fee splitting, or how it triggers liability, but they do not argue or point to any cases stating that Regulation X is ambiguous. Reviewing the language and the stated purpose of Regulation X, we conclude that it is not ambiguous, and we therefore owe the opinion letters and special informational booklet no extra deference.

Two of the policy statements petitioners reference tend to support their position. One states in part:

> It is also illegal for anyone to accept a fee or part of a fee for services if that person has not actually performed settlement services for the fee. For example, a lender may not add to a third party's fee, such as an appraisal fee, and keep the difference.

62 Fed. Reg. 31982, 31998 (June 11, 1997). The second opines that it is illegal for a settlement service provider to mark up a third party's fees for the purpose of making a fee without providing any goods or services in return. See 2000 FDIC Interp. Ltr. LEXIS 39, *24-*27. However, we have analyzed RESPA § 8(b) and rejected this position as expanding RESPA liability past the point authorized by Congress. **[**17]** *See Mercado, 763 F.2d 269, 270-71.* As we stated that case:

> Doubtless RESPA is a broad statute, directed against many things that increase the cost of real estate transactions. ... But the objective of a statute **[*630]** is not a warrant to disregard the terms of the statute. Congress always has some objective in view when it legislates, and it is always possible to move a little farther in the direction of that objective. The fact that Congress has pointed in a particular direction does not authorize a court to march in that direction without limit.

Id. at 271. Absent a formal commitment by HUD to an opposing position, we decline to overrule our established RESPA § 8(b) case law.

We AFFIRM the district court's dismissal with prejudice of plaintiffs' RESPA claim under Fed. R. Civ. P. 12(b)(6) and its dismissal of the state claims for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

1 of 1 DOCUMENT

TYNA L. BOULWARE, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. CROSSLAND MORTGAGE CORPORATION, Defendant-Appellee, UNITED STATES OF AMERICA, Amicus Curiae.

No. 01-2318

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2002 U.S. App. LEXIS 9649

April 4, 2002, Argued

May 22, 2002, Decided

PRIOR HISTORY:
[*1] Appeal from the United States District Court for the District of Maryland, at Greenbelt. Frederic N. Smalkin, Chief District Judge. (CA-01-2114-S).

DISPOSITION:
Affirmed.

COUNSEL:
ARGUED: James Evan Felman, KYNES, MARKMAN & FELMAN, P.A., Tampa, Florida, for Appellant.

Christine N. Kohl, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

Michael Schatzow, VENABLE, BAETJER & HOWARD, L.L.P., Baltimore, Maryland, for Appellee.

ON BRIEF: Katherine Earle Yanes, KYNES, MARKMAN & FELMAN, P.A., Tampa, Florida; Andrew N. Friedman, Gary E. Mason, Victoria S. Nugent, COHEN, MILSTEIN, HAUSFELD & TOLL, Washington, D.C.; Lee S. Shalov, SHALOV, STONE & BONNER, New York, New York; Peter D. Fastow, Steven B. Preller, TROESE, FASTOW & PRELLER, L.L.C., Annapolis, Maryland, for Appellant.

Robert D. McCallum, Jr., Assistant Attorney General, Thomas M. DiBiagio, United States Attorney, Michel Jay Singer, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Richard A. Hauser, General Counsel, Peter S. Race, Assistant General Counsel, Joan L. Kayagil, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Washington, [*2] D.C., for Amicus Curiae.

Mark D. Maneche, VENABLE, BAETJER & HOWARD, L.L.P., Baltimore, Maryland, for Appellee.

JUDGES:
Before WILKINSON, Chief Judge, and WILLIAMS and TRAXLER, Circuit Judges. Chief Judge Wilkinson wrote the opinion, in which Judge Williams and Judge Traxler joined.

OPINIONBY:
WILKINSON

OPINION:

WILKINSON, Chief Judge:

Plaintiff Tyna Boulware claims that § 8(b) of the Real Estate Settlement Procedures Act ("RESPA") is a broad price control statute prohibiting any overcharge for real estate settlement services. Boulware seeks to certify a class to challenge Crossland Mortgage Corporation's alleged overcharge for credit reports. The district court found that Boulware did not allege any split or kickback of the overcharge from Crossland to a third party. It thus dismissed Boulware's complaint and denied class certification. We agree with the Seventh Circuit that § 8(b) is a prohibition on kickbacks rather than a broad price control provision. *See Echevarria v. Chi. Title & Trust Co., 256 F.3d 623 (7th Cir. 2001); Durr v.*

Intercounty Title Co., 14 F.3d 1183 (7th Cir. 1994). We therefore affirm the judgment.

I.

In November 2000, Tyna Boulware, **[*3]** a Maryland consumer, obtained a federally related home mortgage loan from Crossland Mortgage Corporation. n1 In connection with this loan, Crossland purchased Boulware's credit report from a third-party credit reporting agency. On July 18, 2001, Boulware initiated this action, alleging that Crossland violated RESPA § 8(b), *12 U.S.C. § 2607*(b) (2000), by charging her $ 65 for the credit report when it cost Crossland $ 15 or less to obtain it. Boulware claimed that Crossland kept the $ 50 overcharge for itself without performing additional services. She did not allege that the credit reporting agency or any other third party received payment from Crossland beyond that owed to it for services actually performed. n2

n1 On January 2, 2001, Crossland merged into Wells Fargo Home Mortgage, Inc. However, we follow the practice of the district court and parties by referring to the defendant as Crossland.

n2 Because the district court dismissed Boulware's complaint under Fed. R. Civ. P. 12(b)(6), we accept her allegations as true. *See, e.g., Mayes v. Rapoport, 198 F.3d 457, 460 (4th Cir. 1999).*

[*4]

Boulware sought civil remedies under RESPA, including treble damages, attorneys' fees, and costs. *See 12 U.S.C. § 2607*(d). In addition, she sought to certify a class of all parties who had received similar mortgages from Crossland in the past twelve months, and who had paid Crossland for a credit report in connection with their loans.

On October 2, 2001, the district court dismissed Boulware's complaint and denied class certification. Following two Seventh Circuit decisions, the district court held that the "plain words" of RESPA § 8(b) "support the proposition that the statute is only violated where there is a charge for a real estate settlement service that is split or kicked back, not simply where there has been an overcharge." *See Echevarria, 256 F.3d 623; Durr, 14 F.3d 1183.* The district court recognized that the Department of Housing and Urban Development was authorized to promulgate regulations and interpretations of RESPA, *see 12 U.S.C. § 2617,* and intimated that HUD's view of the statute was consistent with Boulware's. However, the court refused to adopt a construction of the statute **[*5]** that went beyond § 8(b)'s plain meaning, "whether condoned by administrative agency utterances or not." Boulware appeals.

II.

A.

RESPA § 8(b) provides:

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). The plain language of § 8(b) makes clear that it does not apply to every overcharge for a real estate settlement service and that § 8(b) is not a broad price-control provision. Therefore, § 8(b) only prohibits overcharges when a "portion" or "percentage" of the overcharge is kicked back to or "split" with a third party. Compensating a third party for services actually performed, without giving the third party a "portion, split, or percentage" of the overcharge, does not violate § 8(b). By using the language "portion, split, or percentage," Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge. n3

n3 An overcharge or unearned fee must be present in order for § 8(b) to apply because the charge must be one "other than for services actually performed." However, the presence of an overcharge alone, without any portion of the overcharge being kicked back to or split with a third party, is not sufficient to fall within the purview of § 8(b).

[*6]

Here, Crossland collected an overcharge and kept it as a "windfall" for itself. *See Durr, 14 F.3d at 1187.* We therefore reject Boulware's argument that § 8(b) applies, and conclude that the district court correctly dismissed her complaint under Rule 12(b)(6).

This very case demonstrates the problems with concluding otherwise. As previously noted, Boulware does not allege that Crossland's purported overcharge was kicked back to or split with the credit reporting agency or any other third party. Outside of a kickback or fee-splitting situation, there is no way to make sense of the statutory directive that "no person shall give and no person shall accept" any portion of an unearned fee. In fact, under Boulware's view, Boulware herself would

have to be the giver contemplated by the statute in order for § 8(b) to apply.

It would be irrational to conclude that Congress intended consumers to be potentially liable under RESPA for paying unearned fees. In addition to civil penalties, RESPA § 8(d) establishes criminal sanctions for violations, including up to one year in prison. And it makes both the giver and the acceptor jointly and severally liable. *See 12 U.S.C. § 2607* **[*7]** (d)(1)-(2). It would be perverse to find that Congress intended to impose such liability on consumers -- the very group it was trying to protect in enacting RESPA. *See 12 U.S.C. § 2601.* Accordingly, the giver in § 8(b) must be some party in the settlement process besides the borrower herself.

Boulware, joined by HUD as amicus curiae, contended at oral argument that the government would not prosecute consumers. However, it is unclear whether the government would be bound by HUD's statement that it is "unlikely to direct any enforcement actions against consumers for the payment of unearned fees." RESPA Statement of Policy 2001-1, *66 Fed. Reg. 53,052, 53,059 n.6* (October 18, 2001). Moreover, it is insufficient for HUD to proclaim that the statute will not be enforced against consumers. We cannot interpret § 8(b) so as to compel the absurd conclusion that Congress drafted it to apply to consumers in the first place. *See, e.g., United States v. Wilson, 503 U.S. 329, 334, 117 L. Ed. 2d 593, 112 S. Ct. 1351 (1992)* (citing *United States v. Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)).* **[*8]**

Boulware cannot give a satisfactory explanation of what the phrase "no person shall give and no person shall accept" means under her interpretation of the statute. She attempts to avoid the problem posed by the prospect of applying § 8(b) to consumers by asserting that a giver and acceptor do not both have to be present for the statute to apply. Alternatively she claims that § 8(b) only applies if the giver knows that services were not rendered. But Boulware's arguments are unpersuasive because these qualifications find no expression in the plain language of the statute. The use of the conjunctive "and" indicates that Congress was clearly aiming at an exchange or transaction, not a unilateral act.

Our interpretation of § 8(b) makes sense of all of the statute's terms and leaves a wide variety of conduct prohibited. For example, the provision would clearly apply to situations where a mortgage lender overcharges a consumer and splits the overcharge with a mortgage service provider, such as a credit reporting agency. In such a case, both the lender/giver and the credit-reporting agency/acceptor would violate § 8(b). In addition, the statute would apply if a mortgage service provider **[*9]** overcharged for its services and gave a mortgage lender a portion of the unearned fee.

In holding that § 8(b) requires fee-splitting or a kickback, our result is consistent with the only other federal appellate court that has addressed the question of whether § 8(b) requires unearned fees to pass from one settlement service provider to another. *See Echevarria, 256 F.3d 623; Durr, 14 F.3d 1183; Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269 (7th Cir. 1985).* The Seventh Circuit has held on three occasions that § 8(b) does not apply to all overcharges for real estate settlement services. Instead, the court explained that § 8(b) "is an anti-kickback statute" which "requires at least two parties to share fees." *Mercado, 763 F.2d at 270.* And the court stressed that "under RESPA's express terms," the broad protection of the statute "extends only over transactions where the defendant gave or received any portion, split, or percentage of any charge to a third party." *Durr, 14 F.3d at 1187* (internal quotation omitted). Furthermore, in both *Echevarria* and *Durr*, the Seventh Circuit confronted **[*10]** facts almost identical to those in the case at bar and found no violation of § 8(b) in the absence of any allegation of a kickback to a third party. *Echevarria, 256 F.3d at 626-27; Durr, 14 F.3d at 1186-87.*

Boulware contends that our interpretation of § 8(b) is incorrect because it makes § 8(a) and § 8(b) both proscribe the same conduct. However, a comparison of these two subsections does not affect our conclusion. Section 8(a) states:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a). It is apparent that § 8(a) is not rendered meaningless by our interpretation of § 8(b). The provisions both seek to eliminate kickbacks or referral fees paid to a third party, but they do so by prohibiting different actions. Section 8(a) prohibits the payment of formal kickbacks or fees for the referral of business and does not require an overcharge to a consumer. **[*11]** On the other hand, § 8(b) prohibits "splitting fees with anyone for anything other than services actually performed." *Willis v. Quality Mortgage USA, Inc., 5 F. Supp. 2d 1306, 1308 (M.D. Ala. 1998)* (noting the differences between § 8(a) and (b)). Section 8(b) therefore requires an overcharge and prohibits conduct where money is moving in the same way as a kickback or referral fee even though there is no explicit referral agreement.

B.

In a further attempt to salvage her claim, Boulware urges us to proceed past the language of § 8(b) to HUD's broader interpretation of the provision. *See 24 C.F.R. § 3500.14(c)* (2001) ("Regulation X"); *66 Fed. Reg. at 53,057-59.* Deference might well be due Regulation X or HUD's statement of policy if § 8(b) were ambiguous. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).* But the text of the statute controls in this case. *Id.*; *see also, e.g., Hillman v. IRS, 263 F.3d 338, 342 (4th Cir. 2001)* (citing *Caminetti v. United States, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)).* **[*12]** Although it is true that "RESPA is a broad statute, directed against many things that increase the cost of real estate transactions," it is equally true that "the objective of a statute is not a warrant to disregard the terms of the statute." *Mercado, 763 F.2d at 271.*

III.

Despite the textual directive of § 8(b), Boulware argues that Congress' intent in enacting § 8(b) was far broader than our reading of it, and that her claim should accordingly not be dismissed. She maintains that Congress intended to forbid all overcharges and markups by mortgage lenders for every real estate settlement service they might provide. Boulware is in effect asking us to subject all settlement services, including, *inter alia*, title searches, title examinations, title insurance, attorneys' services, property surveys, credit reports, pest inspections, real estate agents' and brokers' services, and loan processing, to broad price regulation. In fact, under her interpretation of the statute, HUD or the federal courts could determine what settlement service fees are reasonable in the first instance, without an allegation that the fees were even marked up. *See 66 Fed. Reg. at 53,059* **[*13]** (stating that under HUD's interpretation of § 8(b), which mirrors Boulware's, "[a] single service provider also may be liable under § 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided"). Further, Boulware would provide both a private right of action and potential criminal penalties to enforce the price controls she envisions § 8(b) creating. *See 12 U.S.C. § 2607*(d).

If Congress had intended § 8(b) to sweep as broadly as Boulware proposes, it could easily have written § 8(b) to state that "there shall be no markups or overcharges for real estate settlement services." Or Congress could have explained that "a mortgage lender shall only charge the consumer what is paid to a third party for a real estate settlement service." But Congress chose not to draft the statute that way. And we have no authority to recast it. If we were to read § 8(b) in the way Boulware suggests, every settlement fee would be the subject of potential litigation and discovery, leading perhaps to increased costs for real estate settlement services in the long run. Though the regulation of charging practices would not be beyond **[*14]** the purview of Congress, this was not Congress' intent in enacting RESPA.

Instead, the view that § 8(b) only applies when there is a kickback or split with a third party is actually the view that is consistent with RESPA's stated purposes. In enacting RESPA, Congress proclaimed that "significant reforms in the real estate settlement process" were needed to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices that ha [d] developed in some areas of the country." *12 U.S.C. § 2601*(a). Congress went on to explain that one of the purposes of RESPA was "to effect certain changes in the settlement process," which would result "in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." *12 U.S.C. § 2601*(b)(2).

Nothing in § 2601 indicates that RESPA § 8 was intended to eliminate all settlement service overcharges. Instead, its purpose was "to prohibit all kickback and referral fee arrangements whereby any payment is made or thing of value furnished for the referral of real estate settlement business." *Mercado, 763 F.2d at 270-71* **[*15]** (quoting Senate report). And the provision was designed to prohibit "a person that renders a settlement service from giving or rebating any portion of the charge to any other person except in return for services actually performed." *Id. at 271* (quoting Senate report); *see also Echevarria, 256 F.3d at 627; Durr, 14 F.3d at 1186; Duggan v. Indep. Mortgage Corp., 670 F. Supp. 652, 654 (E.D. Va. 1987).* Therefore, if we subjected a settlement service provider to RESPA liability for keeping an overcharge without requiring an allegation that the unearned fee was shared with a third party, "we would radically, and wrongly, expand the class of cases to which RESPA § 8(b) applies." *Echevarria, 256 F.3d at 627.* n4

n4 In deciding whether to certify a class, a district court has "broad discretion" within the framework of Fed. R. Civ. P. 23. *Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 (4th Cir. 2001).* Because Boulware failed to state a claim as the purported named plaintiff, and because all other similarly situated plaintiffs would likewise fail to state a claim, the district court necessarily acted within its discretion in denying class certification.

[*16]

IV.

RESPA was meant to address certain practices, not enact broad price controls. Congress chose to leave markups and the price of real estate settlement services to the free market by "considering and explicitly rejecting a system of price control for fees." *Mercado, 763 F.2d at 271* (citing Senate report). Instead, Congress "directed § 8 against a particular kind of abuse that it believed interfered with the operation of free markets -- the splitting and kicking back of fees to parties who did nothing in return for the portions they received." *Id.* Accordingly, we decline to extend § 8(b) beyond its text, and we affirm the judgment.

AFFIRMED

State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–0482/1
MJL:...

2003 BILL

AN ACT ...; **relating to:** prohibiting certain real estate closing fees.

Analysis by the Legislative Reference Bureau

This bill prohibits an individual or business from charging a fee for a [redacted] or duplicative real estate closing service or for a real estate closing service that the individual or business did not actually perform.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 706.025 of the statutes is created to read:

706.025 Real estate closing fees. A person may not charge or receive a fee in connection with a transaction under s. 706.001 (2) for a [redacted] duplicative service or for a service that the person did not actually perform. This section does not apply to a person who accepts payment of [redacted] a fee in connection with a transaction under s. 706.001 (2) on behalf of another person and does not retain any portion of the fee.

SECTION 2. Initial applicability.

(1) This act first applies to transactions that closed on the effective date of this subsection.

(END)

State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–0482/1
MJL:jld:pg

2003 BILL

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AN ACT *to create* 706.025 of the statutes; **relating to:** prohibiting certain real estate closing fees.

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SECTION 2. Initial applicability.

0402/1

D/N

This redraft corrects a cross-reference.

MJL

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0482/2dn
MJL:jld:rs

October 18, 2002

This redraft corrects a cross–reference.

Madelon J. Lief
Legislative Attorney
Phone: (608) 267–7380

Emery, Lynn

From: Bruhn, Mike
Sent: Monday, October 21, 2002 12:03 PM
To: LRB.Legal
Subject: Draft review: LRB-0482/2 Topic: Regulation of closing costs for real estate transactions

It has been requested by <Bruhn, Mike> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB-0482/2 Topic: Regulation of closing costs for real estate transactions